Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services	)	WT Docket No. 03-103
	)	
Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules	)	

COMMENTS

The Washington, D.C. telecommunications law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("BloostonLaw"), on behalf of its clients that are licensees under Part 22 of the Commissions Rules, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making ("*Notice*") in the above captioned matter.[1] The Commission proposes to revise or eliminate the Part 22 Public Mobile Services ("PMS") rules that have become obsolete as the result of technological change, Commercial Mobile Radio Services ("CMRS") competition, and supervening changes to related Commission rules. The Commission seeks comment on its tentative conclusion that some of the Part 22 rules are no longer meaningful, necessary, or in the public interest. BloostonLaw supports the Commission's decision to eliminate unnecessary restrictions on Part 22 license holders and, in this regard, recommends that the Commission make it clear that Part 22 licensees may operate as either "common carriers" or "private users." While the Commission has already implemented this flexibility in its procedures, application forms and practices, it should adopt its proposal to modify certain

[1] *See* 68 FR 44003. The Commission's *Notice* was released April 28, 2003.

obsolete Part 22 definitions to conform with this approach. The rules should nevertheless be clear that common carriers and non-common carriers alike have the same opportunity to utilize PMS spectrum, consistent with the Commission's flexible spectrum use policy. This is especially important for a radio service that is struggling to redefine itself in the wake of significant changes in the traditional paging market. Finally, the Commission should eliminate unnecessary notification requirements for dispatch operations on Part 22 spectrum.

II. Introduction

Recognizing the changing role of paging, and the need for more varied communications services, the Commission has over recent years sought to liberalize its spectrum policy, and modify Part 22 of its rules to widen the potential use of PMS spectrum. Thus, the Commission has enunciated its "Flexible Spectrum Use" doctrine, and has explicitly allowed dispatch service (for a time restricted to the realm of Part 90 private radio channels) on Part 22 frequencies.[2] Pursuant to this updated spectrum approach, the Commission has allowed paging market area licensees to elect CMRS or Private Mobile Radio Service ("PMRS") status. However, the need to update the wording of Rule Sections 22.7, 22.99 and 22.351 appears to have been overlooked in this process, and these rules could be interpreted as *requiring* CMRS status for Part 22 licensees. For example, Rule Section 22.7 states in pertinent part, "[e]xcept as otherwise provided in this part, existing and proposed common carriers are eligible to hold authorizations in the Public Mobile Services."[3] Rule Section 22.99 defines "Public Mobile Services" as "radio services in which common carriers are authorized to offer and provide mobile and related fixed radio services for hire to the public." Rule Section 22.351 similarly refers to "common carriers."

[2] *See* Rule Section 22.577.
[3] 47 C.F.R. § 22.7.

The Commission now proposes to eliminate the "common carrier" language reflected in these rules, so that Part 22 will be in conformance with its wireless regulatory policies. It also recognizes that there is "significant competition among PMS providers" and that retention of the requirement is not needed.[4]

BloostonLaw agrees that the Commission should eliminate any notion that PMS licensees must operate as "common carriers." Instead, the Commission should reword Section 22.7 to clarify that Part 22 licensees may operate on a CMRS *or PMRS* basis, and that such licensees will be subject to the rights and obligations of the regulatory regime that they have elected. Many licenses in the mobile services are held by diverse business, public safety and governmental entities, or other specialized radio users that do not want to become, or, in some cases, may be prohibited from becoming "common carriers." Moreover, there is a public benefit to allowing the widest possible use of the PMS spectrum, so that important niche services may be developed in addition to the traditional Part 22 services. This is especially true for Part 22 market area licensees that must satisfy a buildout requirement. The Commission should reinforce its efforts to spur spectrum efficiency and licensee innovation by clarifying the wording of Rule Sections 22.7, 22.99 and 22.351, so as to reflect the flexible spectrum use policy already in place. At the same time, the Commission should make it clear that Part 22 licensees who elect CMRS status will have the same rights and obligations as other CMRS carriers.

III. Supervening Decisions and Flexibility Policies Have Already Supplanted Any "Common Carrier" Requirement

The Commission should clarify that common carrier status is an option rather than a requirement for Part 22 licensees, since a Congressional mandate and the Commission's own

[4] *Notice*, para. 28.

supervening decisions associated with a policy of regulatory flexibility have already supplanted the common carrier requirement. The original eligibility requirement has outlived its usefulness, and has been eliminated in practice.

Pursuant to Congressional mandate, the Commission adopted changes to its technical, operational, and licensing rules for common carrier and mobile radio services that were necessary to implement Section 309 of the Act.[5] These changes were, and continue to be necessary to establish regulatory symmetry among similar mobile services, including Part 22 and Part 90 paging/mobile service providers. And the Commission has explicitly acknowledged the necessity of that symmetry.[6] Accordingly, the Commission has both the authority and the directive to change the PMS licensee eligibility characteristic by allowing licensees to choose between CMRS and PMRS status. Clarifying the wording of Section 22.7 will accomplish this mandate. Part 90 paging licensees (who can configure their systems to provide the same services as Part 22 paging operations) have been given the choice between CMRS and PMRS status, pursuant to Congress' regulatory parity mandate.[7] If Section 22.7 is interpreted to require common carrier status for Part 22 licensees, it would be contrary to the regulatory parity that the Commission has been implementing through its policies and practices. In contrast, clarifying the wording of Section 22.7 would help to ensure that consumer demand, not regulatory decree, dictates the course of the mobile services marketplace.

The Commission's regulatory policy decisions and other rule revisions have also

[5] 47 C.F.R. § 309.

[6] *Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 6341, para. 1 (2000).

[7] *See, Public Notice, Information for Part 90 Licensees Subject to Reclassification as CMRS Providers on August 10*, 1996`, 11 FCC Rcd. 9267 (rel. August 6, 1996)(stating that Part 90 paging licensees can elect PMRS status by providing non-interconnected or private use service; can switch from CMRS to PMRS status after their initial election; and can choose dual CMRS/PMRS status).

supplanted the necessity or usefulness of a common carriage requirement. Most importantly, the Commission formally articulated its flexible spectrum use policy in *Spectrum Policy Statements* in both 1999 and 2000.[8] In the *1999 Spectrum Policy Statement*, the Commission concluded that "[f]lexible allocations may result in more efficient spectrum markets. Flexibility can be permitted through the use of relaxed service rules, which would allow licensees greater freedom in determining the specific services to be offered."[9] The Commission further concluded that if market forces are allowed to operate without being restricted by government, they will tend to push the use of radio licenses to their highest valued applications.[10] In its 2000 *Spectrum Policy Statement*, the Commission concluded that "[l]icensees/users should have flexibility in determining the services to be provided and the technology used for operation consistent with the other policies and rules governing the service."[11] The Commission's decision to implement a flexible use policy, with relaxed service and use restrictions, dictate that Part 22 licensees have the option to operate on a PMRS basis.

This flexible use policy has been implemented on a widespread basis in recent years. In its *Part 101 Report and Order*, the Commission eliminated the restriction on the use of common carrier transmitters for non-common carrier purposes[12] and later eliminated the rule prohibiting stations licensed as private systems from leasing reserve capacity to common carriers for their

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[8] *Policy Statement on Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd 19868 (1999)(*"1999 Spectrum Policy Statement"*); *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 15 FCC Rcd 24178 (2000)*("2000 Spectrum Policy Statement*").

[9] *1999 Spectrum Policy Statement*, 14 FCC Rcd 19868 at para. 9.

[10] *Id.*

[11] *2000 Spectrum Policy Statement*, 15 FCC Rcd 24178 at para. 20.

[12] *Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services*, Report and Order, WT Docket No. 94-148, 11 FCC Rcd 13449, para. 39 (1996)(*"Part 101 Report and Order"*).

common carrier traffic.[13] Also, Rule Sections 24.12 and 27.12 governing Personal Communications Services and Miscellaneous Wireless Services, respectively, do not limit license holders to entities that already are or plan to become common carriers.[14] In 1997, the Commission applied a flexible use policy when establishing the Wireless Communications Service, imposing no eligibility restrictions other than the foreign ownership restrictions set forth in Section 310 of the Communications Act.[15] Since then, the Commission has applied that policy to broaden eligibility in the Cable Television Relay Service;[16] to establish eligibility for a broad variety of users in the 648-746 MHz band (reclaimed from broadcasters using TV channels 52-59);[17] to establish service rules for the 747-762 MHz and 777-792 MHz bands (reclaimed from broadcasters using TV channels 60-69);[18] and to explore the possibility of introducing third generation cellular services in frequency bands previously reserved for traditional forms of cellular, broadband PCS, and SMR, as well as in the 1710-1755 MHz, 1755-1850 MHz, 2110-2150 MHz, 2160-2165 MHz and 2500-2690 MHz bands.[19]

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[13] *Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications in the Wireless Telecommunications Services*, WT Docket No. 00-19, *Telecommunications Industry Association Petition for Rulemaking* RM-9418, Report and Order, para. 12 (FCC 02-218)(rel. July 31, 2002)(modifying the restriction in Rule Section 101.603(b)(1) associated with private operational fixed microwave services)("*Report and Order*").

[14] 47 C.F.R. §§ 24.12, 27.12.

[15] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service* ("WCS"), GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785 (1997). *See also* Rule Sections 24.12 and 27.12.

[16] *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd 9,930 (2002).

[17] R*eallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59),* Notice of Proposed Rulemaking, 16 FCC Rcd 7,278 (2001).

[18] *Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, *First* Report and Order, 15 FCC Rcd 476 (2000).

[19] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems,* Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596 (2001).

Modifying the common carriage language, to the extent that it is not already modified in policy and practice, will allow and encourage Part 22 licensees to more fully utilize their assigned frequencies. It would also likely allow further development of secondary markets as licensees will be able to offer any underutilized frequencies to a larger class of entities as both common carriers and non-common carriers will be able to utilize the PMS frequencies, consistent with the Commission's recent decision in its Secondary Spectrum Market proceeding.[20]

IV. Elimination of the Common Carriage Requirement Is In the Public Interest

The proposed elimination of the common carriage requirement is in the public interest. Common carrier obligations are administratively burdensome and impose unnecessary costs upon PMS providers that choose to establish non-interconnected and/or internal or other private use operations. Increased demand for wireless services is being propelled by a host of developments including the growing shift of our economy toward the service sector, the increasing mobility of our workforce, and the convenience and increased efficiency produced by mobile communications combined with improved performance and the falling costs of wireless devices. Public safety systems and specialized private users face increasing spectrum requirements, and there are often not enough available Part 90 channels to satisfy this demand.

While it is important to clarify that Part 22 licensees have the option to operate on a PMRS basis, it is equally important to confirm that those licensees choosing CMRS status will retain their rights as "common carriers," for purposes of interconnection rights and others under Title II of the Communications Act. These rights are important for those licensees that choose to

[20] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 24,203 (2000).

offer telecommunications service to the public on a for-profit, non-discriminatory basis.

V. The Commission Should Revise Rule Sections 22.99 and 22.351

The Commission should likewise revise Rule Sections 22.99 and 22.351 by eliminating obsolete definitions and eliminating references to a "common carrier." The Commission notes that the terms "Radio Common Carrier" and "Wireline Common Carrier" of Rule Section 22.99 are no longer used in Part 22, and that the distinctions previously drawn by its rules for those carriers are obsolete.[21] Similarly, the Commission should replace the term "common carrier" with the term "licensee" in the Section 22.99 definition of "Public Mobile Services," in the third sentence of Rule Section 22.351 (governing assignments) with the term "licensee."[22]

VI. The Commission Should Eliminate Unnecessary Requirements for Dispatch Operations Under Rule Section 22.577

Rule Section 22.577(b) currently provides that Part 22 licensees wishing to provide dispatch service on their channels must notify the Commission on FCC Form 601 whenever a dispatch transmitter is installed, and must provide the name and address of the subscriber for which such transmitter is installed. This requirement harkens back to the time when dispatch service was allowed on Part 22 spectrum under more rigorous licensing requirements. It is respectfully submitted that, in light of the Commission's flexible spectrum use policy, its migration toward market area licensing on the Part 22 channels, and relaxation over the years of its regulatory requirements, that this requirement is no longer necessary. First, the Commission should clarify that market area licensees under Part 22 need not notify the Commission of the construction of dispatch stations within their geographic service area, so long as the

[21] *Id.* para. 29.
[22] *Id.* para. 30.

environmental protection, interference mitigation, and other technical rules are met. Under these circumstances, there is no need for the Commission to burden Part 22 licensees with a notification requirement. For individual site licenses under the former licensing scheme, it should not be necessary to provide the Commission with the name and address of the subscriber, especially since this information may be proprietary. To the extent that the Commission continues to have a legitimate interest in preventing potentially harmful interference from the operation of a dispatch station, the location of the station should be sufficient.

VII. The Commission Should Eliminate Unnecessary Composite Interference Contour Requirements Under Rule Section 1.929(c)(1)

The Commission should modify Rule Section 1.929(c)(1) to allow any increase in the composite interference contour ("CIC") of a site-based licensee in the Paging and Radiotelephone Service, Rural Radiotelephone Service and 800 MHz Specialized Mobile Radio Service over water, to be treated as a minor modification of license. The Commission's Wireless Bureau has already noted that CIC expansions solely over water should pose no risk of harmful interference to other systems on land, and that requiring submission of applications as major modifications is burdensome for licensees.[23] Accordingly, BloostonLaw supports the Commission's tentative conclusion to amend Rule Section 1.929(c)(1) so that such CIC expansions are deemed to be a minor modification of license.

VIII. Conclusion

The Commission should modify Rule Sections 22.7, 22.99 and 22.351, to formally codify its established policy of regulatory flexibility for Part 22 and other licensees. The Commission

[23] N*otice*, at note 141.

should also eliminate unnecessary regulation of dispatch station operations on Part 22 channels and permit CIC expansions over water as a minor modification of license.

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